FACULTY OF LAW

UNIVERSITY OF TORONTO

and

LAW SCHOOL

DALHOUSIE UNIVERSITY

MATERIALS ON CONFLICT OF LAWS

VOLUME II

September, 1992

John Swan

Aird & Berlis
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We are grateful for the help of many students, now too numerous to mention individually, over the past many years in the constant revisions in the organization and text of these materials.

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A NEW BEGINNING

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involve citizens of other States. This is no substitute for uniform State laws or for obtaining uniformity by covering the subject by Federal law. Undoubtedly ease of travel and communication, and the increase in interstate business have rendered more awkward discrepancies between the laws of the States in many respects. But this is not a condition to be cured by introducing or extending principles of extraterritoriality, as though we were living in the days of the Roman or British Empire, when the concepts were formed that the rights of a Roman or an Englishman were so significant that they must be enforced throughout the world even where they were otherwise unlikely to be honored by "lesser breeds without the law." Importing the principles of extraterritoriality into the conflicts of laws between the States of the United States can only make confusion worse confounded. If extraterritoriality is to be the criterion, what would happen, for example, in case of an automobile accident where some of the passengers came from or were picked up in States or countries where causes of action against the driver were prohibited, others where gross negligence needed to be shown, some, perhaps, from States where contributory negligence and others where comparative negligence prevailed? In the majority opinion it is said that "Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern." This is hardly consistent with the statement in the footnote that gross negligence would not need to be established in an action by a passenger if the accident occurred in a State whose statute so required. If the status of the passenger as a New Yorker would prevent the operation of a statute in a sister State or neighboring country which granted immunity to the driver in suits by passengers, it is said that it would also prevent the operation of a statute which instead of granting immunity permits recovery only in case of gross negligence. There are passenger statutes or common-law decisions requiring gross negligence or its substantial equivalent to be shown in 29 States. One wonders what would happen if contributory negligence were eliminated as a defense by statute in another jurisdiction? Or if comparative negligence were established as the rule in the other State?

In my view there is no overriding consideration of public policy which justifies or directs this change in the established rule or renders necessary or advisable the confusion which such a change will introduce.

NOTES

1. You will remember that *Babcock v. Jackson* was referred to in Lord Wilberforce's judgment in *Chaplin v. Boys* (Vol. I, pp. 120 at 126, 127). Do you see now that Lord Wilberforce misunderstood the significance of that decision in the context of the traditional rules? *Babcock v. Jackson* is *not* in that context: it is based on quite a different theory, one that must be regarded as either rejecting the traditional theory or being entirely inconsistent with it.

2. *Babcock v. Jackson* unleashed a controversy that was truly awesome. There were symposia, whole journal numbers devoted to dis-

cussions of the case. Every academic claimed that it supported his theory. For the next ten years the development in the American cases was an incredible outpouring of scholarly judgments, punctuated here and there by the cries of the traditionalists as they looked on what had happened to the law as they thought they had known it. Each judgment provoked its academic response, and the judges explicitly built on the views of the academics. The judges became expert at the development of interest analysis.

3. There is room for debate over whether *Babcock* was decided on the basis of a Currie-style interest analysis or whether the judgment in that case was mainly a matter of contact counting. However, in a case decided six years after *Babcock* the New York Court of Appeals clearly adopted a full-blown Currie approach. In *Tooker v. Lopez* (1969), 249 N.E. 2d 394, Catherina Tooker and Marcia Lopez were both New York domiciliaries who were in attendance at the University of Michigan. The left Ann Arbor on a weekend trip to Detroit in a car owned by Lopez's father, who lived in New York and registered and insured his car there. Both Tooker and Lopez were killed in a one-car accident and the former's estate brought a wrongful death action in New York. Michigan had a guest passenger statute which permitted suit only if there was gross negligence, however the New York court concluded that despite the fact that the automobile trip began and was to end in Michigan, that state had absolutely no interest in the application of its law to this action. *Tooker v. Lopez* is discussed in the case that follows these notes.

4. Other state courts adopted Currie's interest analysis, though they continued to experiment with a variety of ways of resolving true conflicts. In *Bernhard v. Harrah's Club* (1976), 546 P. 2d 719, the California Supreme Court dealt with a true conflict involving choice of law in tort. Two Californians had crossed into Nevada to drink at the defendant's bar. They left in an intoxicated state, drove back into California and there negligently injured the plaintiff. The plaintiff then brought an action in California against the Nevada tavern owner, relying on California law which imposed liability on tavern owners who continue to serve customers who are obviously drunk. Nevada did not impose civil liability on the tavern owner in these circumstances, though an owner might be criminally liable. In holding that California law applied, Sullivan J. noted that the case

> involves a California resident (plaintiff) injured in this state by intoxicated drivers and a Nevada resident tavern keeper (defendant) which served alcoholic beverages to them in Nevada, it is clear that each state has an interest in its respective law of liability or non-liability. . .
>
> Once this preliminary analysis has identified a true conflict of the governmental interests involved as applied to the parties under the particular circumstances of the case, the "comparative impairment" approach to the resolution of such conflict seeks to determine which state's interest would be

> York to escape a liability that would be imposed on him here; and a departure based on the fact a New York resident makes the claim for injury. The first ground of departure is justifiable as sound policy; the second is justifiable only if one is willing to treat the rights of a stranger permitted to sue in New York differently from the way a resident is treated. Neither because of "interest" nor "contact" nor any other defensible ground is it proper to say in a court of law that the rights of one man whose suit is accepted shall be adjudged differently on the merits on the basis of where he happens to live.
>
> This crunch in the rule announced in *Babcock* was inevitable as it worked its way into the practice. And the difficulty was recognized in *Tooker*. Although *Tooker*, unlike the present case, involved a New York plaintiff and thus was similar to Babcock and the cases which had followed *Babcock*, the opinion of the court laid it down that the New York owner of a car insured in New York would not be permitted to escape liability through the guest statute of Michigan and that this was the main ground of decision. The court in *Tooker* said (p. 575): "This purpose [of a statute of another jurisdiction establishing higher standards for the recovery of guests in vehicles] can never be vindicated when the insurer is a New York carrier and the defendant is sued in the courts of this State. Under such circumstances, the jurisdiction enacting such a guest statute has absolutely no interest in the application of its law."
>
> . . .
>
> What the court is deciding today is that although it will prevent a New York car owner from asserting the defense of a protective foreign statute when a New York resident in whose rights it has an "interest" sues; it has no such "interest" when it accepts the suit in New York of a nonresident. This is an inadmissible distinction.

NOTES

1. *Neumeier v. Kuehner* is sometimes referred to as an "unprovided for" case or as a "no-conflict" case, as opposed to a "true conflict" or "false conflict" case. We have briefly explored these terms earlier. As an "unprovided-for-case" the court sees that the purpose of neither the New York rule nor the Ontario rule would be further by any decision it might make. Ontario does not seek to protect this defendant and his insurer, and New York is not concerned to protect this plaintiff by an award of damages. Given this situation, what should the court do?

2. *Neumeier v. Kuehner* was seen by some as a defeat for Currie's interest analysis: where are the Emperor's clothes when there are no governmental interests that bear on the case? Perhaps as a result or simply in despair, there is certainly a "counter-revolution" among American scholars. We do not have time to go into this movement here. Its principal features are:

(a) The ascription of governmental interests can amount to nothing more than the beliefs of academics or judges about how far certain policies ought to reach: Brilmayer, "Interest Analysis and the Myth of Legislative Intent" (1980), 78 *Mich. L. Rev.* 392.

(b) Even if we can determine the domestic policy underlying a rule, that fact tells us nothing about its proper spatial application: Juenger, "Conflict of Laws: A Critique of Interest Analysis" (1984), 32 *Am. J. Comp. L.* 1.

(c) Statutory rules are the product of compromise and have no discernible purpose: Juenger, *op. cit.*

(d) Interest is too narrow in that it fails to recognize that choice of law cases require a consideration of *multi-state* interests: von Mehren, "Book Review" (1964) 17 *J. Legal Ed.* 91.

3. These criticisms (and others) were discussed and responded to by Herma Hill Kay in *A Defence of Currie's Governmental Interest Analysis*, Vol 215, *Receuil des Cours* (Academy of International Law, 1989).

4. The "rules" proposed by Fuld C.J. are an example of the direction that some modern American conflicts scholars are taking. They have seen that interest analysis has not provided any answer to the problems that the courts must deal with. Similarly the goal behind both Restatement, First and Restatement, Second, the goal of ensuring that there would be uniform decisions reached in all courts in which the dispute might be litigated is unlikely to be achievable. (The crucial provisions of the Restatement, Second are set out earlier, *supra*, p. 35) The result of these perceptions has been a retreat to rules which are, at best, merely variations of the old, jurisdiction selecting rules of conflicts. There is nothing to suggest that such a retreat would avoid any of the problems which led to the original difficulties with the traditional rules. What is wrong with the analysis of the Restatement, Second, and all other American writers is that they see for a role for conflicts rules that is simply one that cannot be performed by rules of any type. No sooner had Fuld propounded his "rules" than they were shown to be unworkable, so that particular development was aborted.

5. What is, in our opinion, wrong with all the American approaches is the belief that the rules of Conflicts are intended to ensure that decisions will be the same regardless of where the plaintiff chooses to sue. The vice of forum-shopping is seen as so serious that a fundamentally flawed and anachronistic method of reasoning is perpetuated. This need justifies the retention of something called the "Conflict of Laws", but the more we look at it, the less there seems to be there.

6. The successors to Cavers, and Cavers himself, made some important contributions. Jurisdiction selecting rules of the *Dicey & Morris* type have been abandoned, and the rules are at least capable of identifying the hard cases, and of differentiating them form the easy cases. All the American approaches, for example, agree on the resolution of false conflicts—those are the easy cases. It is obvious that no method of analysis and no theory of conflicts can hope to achieve uniformity in the case of true conflicts.

7. We shall have to leave the American approach and develop something for ourselves if we are going to find any kind of principled basis for the decision of conflicts cases. A principled basis must be one that is faithful to the need for every decision to reflect what we regard as the demands of rationality, and the simple fact that there are different rules in force in the different provinces of Canada, just as there are among the states in the United States, or between the countries of the world.

NOTES

1. *Allstate v. Hague* may give the impression that American constitutional limitations on choice of law are so weak as to be non-existent. This is not so. In *Phillips Petroleum Co. v. Shutts* (1985), 472 U.S. 797, the Supreme Court reversed a judgment of the Supreme Court of Kansas which had upheld the application of Kansas law to the plaintiff's action. *Shutts* was a class action brought by a large number of natural gas lessors. There were plaintiffs resident in all 50 states and the suit concerned land in 11 states, including Kansas. They argued that Kansas law should govern their claim. The defendant, Phillips Petroleum, a Delaware corporation with its head office in Oklahoma, argued that it was unconstitutional to apply Kansas law to the entire claim. The Kansas courts held that in a nation-wide class action suit the law of the forum should apply unless compelling reasons exist for applying a different law. In allowing the defendant's appeal, Rehnquist J. said:

> [T]his is something of a "bootstrap" argument. The Kansas class-action statute, like those of most other jurisdictions, requires that there be "common issues of law or fact". But while a state may . . . assume jurisdiction over the claims of plaintiffs whose principal contacts are with other states, it may not use that assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law." The issue of personal jurisdiction over plaintiffs in a class-action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.
>
> Kansas must have a "significant contact or aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests" in order to ensure that the choice of Kansas law is not arbitrary or unfair. . . . Given Kansas' lack "interest" in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair to exceed constitutional limits.

2. Notice the limited right of review of state court decisions by the United States Supreme Court. None of the judges in *Hague* would have supported Minnesota's choice of law rule if the Supreme Court had the power to review state law. All that the Supreme Court could do was to make sure that Minnesota stayed within the constitutional limits on its power to apply its own law.

3. We cannot now investigate even some of the cases referred to in the judgments. What is clear is that there may often be a complicated inquiry necessary to determine whether a state may properly apply its law to a case with geographically complex facts.

4. The criteria used by the Supreme Court are, to say the least, varied and comprehensive. The plurality mentions:

(a) Minnesota's concern for its non-resident employees;

(b) the fact that Allstate does business in Minnesota; and

(c) the respondent, the deceased's widow, became a Minnesota resident before the litigation began.

The validity of these "contacts" is certainly open to challenge and, indeed, the volume of academic comment—mostly negative—following *Allstate v. Hague* was considerable.

5. The power of the Supreme Court of Canada in a case analogous to *Allstate v. Hague* would be (subject to what may be derived from *De Savoye v. Morguard Investments Ltd.*) based on subsections 92(13) and 92(14) of the *Constitution Act, 1867*. Those subsections provide:

> **92.** In each province the Legislature may exclusively make Laws in relation to Matters coming with the Classes of Subject next hereinafter enumerated; that is to say, —
>
> . . .
>
> **13.** Property and Civil Rights in the Province.
>
> **14.** The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both the Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

6. It is accepted that these subsections limit the powers of the provinces to legislate extraterritorially. Hogg, in *Constitutional Law of Canada* 2nd. ed., p. 275, ff, discusses how the *Allstate v. Hague* problems might be dealt with in Canada. He observes, for example, at p. 279:

> While Canada does not have an equivalent to the due process clause of the fourteenth amendment for cases where only economic issues are at stake, in my view the due process test, as elaborated in [*Moran v. Pyle National (Canada) Ltd.*], could as easily serve as a test of extraterritoriality under the Constitution of Canada.
